

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

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| FRIENDSHIP SUPPORTED LIVING, INC., | : | |
| | : | |
| Appellant, | : | CASE NO. 15CVF-8721 |
| | : | |
| vs. | : | JUDGE BEATTY |
| | : | |
| DIRECTOR, OHIO DEPARTMENT OF JOB | : | |
| AND FAMILY SERVICES, | : | |
| | : | |
| Appellee. | : | |

DECISION AND JUDGMENT ENTRY
REVERSING THE DECISION OF
THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION
AND
NOTICE OF FINAL APPEALABLE ORDER

BEATTY, JUDGE

This is an appeal pursuant to R.C. 4141.26 from a Decision of the Unemployment Compensation Review Commission (the “Commission”). The issue in this case is whether an individual working for Appellant was properly determined to be a covered employee as opposed to an independent contractor.

I. FACTS

On November 6, 2014, the Ohio Department of Job and Family Services (“ODJFS”) notified Appellant of a determination that it was a liable employer for unemployment compensation purposes. Appellant applied to the Director of ODJFS for reconsideration of the determination. On December 4, 2014, the Director affirmed the determination.

Appellant then applied to the Commission for a review of the Director’s reconsidered decision. On August 18, 2015, the Commission conducted a hearing.

Appellant presented the testimony of its owner, Florence Hein. ODJFS presented the testimony of Shelley Perez, an Unemployment Compensation Specialist. The evidence at the hearing was as follows.

Ms. Hein testified that Appellant provides home care for developmentally disabled people. (T. 7-8). Appellant receives a referral for a particular client under a state program administered by the Ohio Department of Developmental Disabilities, and an individual service plan (“ISP”) is developed that becomes Appellant’s contract. (T. 13). The ISP, controlled by the State, establishes the number of hours and timing of services for the client. (T. 14).

Ms. Hein testified that Yvonne Bruce worked with Appellant from 2008 to 2014 as a “1099 contractor direct care.” (T. 7). She stated that Ms. Bruce provided in-home care of developmentally disabled persons pursuant to the ISPs. (T. 8). She stated that Ms. Bruce held herself out to the community as a direct care staff person for hire. (T. 9). Ms. Bruce signed a contract with Appellant and understood that she was an independent contractor. (T. 15-16). Ms. Hein identified the contract signed by Ms. Bruce. (T. 22; Ex. E). The contract states that the service provider is a self-employed provider of supported living services and will not be provided employee benefits. (Ex. E).

Ms. Hein testified that Ms. Bruce was given placements with clients based on the hours she said she was available to work. (T. 9.). Appellant would provide the address and Ms. Bruce would meet the client. (T. 10). Ms. Hein stated that “within parameters,” Ms. Bruce would tell Ms. Hein when she was going to show up to work with the assigned clients. (*Id.*). Ms. Bruce could call in to see if there were hours available or choose not to work on a certain day. (T. 14). She could refuse to work certain hours. (T. 16). She

did not work full time. (T. 16). Ms. Hein stated that Ms. Bruce was not supervised in her work by anyone. (T. 10). If clients had a concern about Ms. Bruce, “they would probably tell an employee, a coordinator” with Appellant or Ms. Hein, their social worker. (*Id.*). Ms. Bruce could decline work with a particular client and vice versa. (T. 14).

Ms. Hein testified that Ms. Bruce was paid weekly at her request at an hourly rate. (T. 8). She submitted an invoice to Appellant for the hours she worked. (T. 14).

Appellant did not provide training to direct care staff persons. (T. 11). They used their own cars and paid for their own insurance; they billed Appellant for mileage when driving clients. (*Id.*). No other expenses were paid by Appellant for direct care staff, and tools and materials were not required. (*Id.*). If Ms. Bruce were unable to provide a service, she did not arrange for a substitute. (T. 12).

Ms. Hein testified that Appellant did have employees who were health services coordinators. (T. 19, 26). The coordinators supervise the ISP, coordinate with guardians, behavior specialists, the County, employers, and skilled nursing, attend medical appointments with the clients, do quality assurance with the clients, etc. (T. 19). The coordinators are required to work certain hours, are on call, and are supervised by Appellant. (T. 20).

Ms. Bruce and other direct care staff worked for Appellant as well as for other companies. (T. 12, 17).

Ms. Hein stated that Appellant’s direct care staff were determined by the Bureau of Workers’ Compensation to be independent contractors rather than employees. (T. 20).

Ms. Hein stated that the State and other competitors also have independent contractors that provide the same services as Appellant's direct care staff. (T. 16-17). She stated that it is standard in the industry that independent contractors are used to perform these services. (T. 17).

Shelley Perez testified regarding her involvement in an investigation relating to Ms. Bruce. (T. 30). She testified that she had a telephone conversation with Appellant's Jerry Hein. (T. 31). She testified that she was informed that Appellant had employees, the coordinators, who met with clients to make sure that the ISPs were followed. (T. 32). She stated that she concluded Ms. Bruce was an employee because she had no direction and control over her work, she was paid hourly and regularly, she reported to supervisors and followed plans, she could not substitute for herself, and the employer or the County supplied the necessary tools. (T. 33).

On September 2, 2015, the Commission rendered its Decision, finding that Ms. Bruce was engaged in covered employment. The Commission's reasoning was as follows:

The determining factor is control. In this instance, the employer does have the right to control this individual performing home health services to the extent as to bring her services under unemployment compensation law coverage as defined by Ohio law. Friendship Supported Living, Inc. did have the right to direct or control the manner or means of work performed by the individual in question. As Friendship Supported Living, Inc. specialized in providing home health services to developmentally disabled clients, direct care staff persons and home health aides are essential to the profitability of the company. The individual performed services that were an integral part of the regular functions of the company. In addition, the company paid the worker on a regular recurrent schedule. (Decision, p. 5).

On October 1, 2015, Appellant filed this appeal from the Commission's Decision.

II. STANDARD OF REVIEW

This Court must affirm the Order of the Commission if it is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 4141.26(D)(2).

III. THE COURT’S FINDINGS AND CONCLUSIONS

Ohio employers must pay contributions into Ohio's unemployment compensation fund. R.C. 4141.23(A). The definition of “employer” includes any individual or organization that has “in employment at least one individual.” R.C. 4141.01(A)(1)(a).

“Employment” means

[S]ervice performed by an individual for remuneration under any contract of hire, written or oral, express or implied * * *, unless it is shown to the satisfaction of the director that such individual has been and will continue to be free from direction or control over the performance of such service, both under a contract of service and in fact.

R.C. 4141.01(B)(1). The alleged employer bears the burden of proving that the worker is not an employee and, thus, that it need not contribute to the unemployment compensation fund. *Miracle Home Health Care, LLC, v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 12AP-318, 2012-Ohio-5669, ¶21.

Ohio Adm. Code 4141-3-05(B) sets forth 20 factors as "guides" for determining whether sufficient direction or control exists to create an employer-employee relationship. These factors are drawn from the common law, where they are used to distinguish between employees and independent contractors. The factors include:

- (1) The worker is required to comply with the instructions of the person for whom services are being performed, regarding when, where, and how the worker is to perform the services;
- (2) The person for whom services are being performed requires particular training for the worker performing services;

- (3) The services provided are part of the regular business of the person from whom services are being performed;
- (4) The person for whom services are being performed requires that services be provided by a particular worker;
- (5) The person for whom services are being performed hires, supervises or pays the wages of the worker performing services;
- (6) A continuing relationship exists between the person for whom services are being performed and the worker performing services that contemplates continuing or recurring work, even if not full time;
- (7) The person for whom services are being performed requires set hours during which services are to be performed;
- (8) The person for whom services are being performed requires the worker to devote himself or herself full time to the business of the person for whom services are being performed;
- (9) The person for whom services are being performed requires that work be performed on its premises;
- (10) The person for whom services are being performed requires that the worker follow the order of work set by the person for whom services are being performed;
- (11) The person for whom services are being performed requires the worker to make oral or written progress reports;
- (12) The person for whom services are being performed pays the worker on a regular basis such as hourly, weekly or monthly;
- (13) The person for whom services are being performed pays expenses for the worker performing services;
- (14) The person for whom services are being performed furnishes tools, instrumentalities, and other materials for use by the worker in performing services;
- (15) There is a lack of investment by the worker in the facilities used to perform services;
- (16) There is a lack of profit or loss to the worker performing services as a result of the performance of such services;

(17) The worker performing services is not performing services for a number of persons at the same time;

(18) The worker performing services does not make such services available to the general public;

(19) The person for whom services are being performed has a right to discharge the worker performing services;

(20) The worker performing services has the right to end the relationship with the person for whom services are being performed without incurring liability pursuant to an employment contract or agreement.

The above factors are “guides” to be considered in their totality; the essential and determining factor is the right to direct or control the performance of services.

After setting forth the above list of 20 factors to be considered, the Commission’s Decision reached the conclusion that Appellant had the right to control Ms. Bruce in performing home health services. However, as support for its Decision, the Commission cited only three findings: that direct care staff were essential to the profitability of the company, the services were an integral part of the regular functions of the company, and the company paid the worker on a regular recurrent schedule. These three findings do not show that Appellant had the right to direct or control the performance of services.

The testimony of Ms. Perez at the hearing shows that the extent of her investigation was one telephone conversation. Her brief testimony focused on the fact that Appellant had coordinators who met with clients to make sure that the ISPs were followed. However, the ISPs were developed with and controlled by the State, not established by Appellant. (T. 13-14).

The above 20 factors must be considered in their totality. Ms. Bruce was not required to comply with the instructions of Appellant regarding when, where, and how the

work was performed. Ms. Bruce could call in to see if hours were available or choose not to work; her placements depended on when she was available. (T. 9-16). Appellant did not provide or require training. (T. 11). While the services were a part of Appellant's regular business, they were not required to be performed by a particular worker. (T. 14). Ms. Hein testified that Appellant did not supervise Ms. Bruce in performing the services; rather, the services were performed according to the ISP. (T. 10-16). While Ms. Bruce provided services over a lengthy period, she had no obligation to continue work and direct care staff could work off and on. (T. 9-16). Ms. Bruce was not required to devote herself full-time to the business. (*Id.*). The work was not performed on Appellant's premises. (*Id.*). Ms. Bruce was not required to perform an order of work set by Appellant; as noted, the work was performed according to the ISP. (T. 10-16). Ms. Bruce provided the documentation of services required by the ISP. (T. 27). While Ms. Bruce was paid regularly, her expenses generally were not paid. (T. 11). Ms. Hein testified that tools and materials were not provided. (*Id.*). Ms. Bruce did not invest in the facilities and did not have a risk of loss. Ms. Bruce worked for Appellant and for other companies and made her services available to the public. (T. 9, 12). Both Ms. Bruce and Appellant had a right to end their relationship. The totality of the factors weighs strongly in favor of an independent contractor relationship.

The essential and determining factor is the right to direct or control the performance of services. The evidence shows that Ms. Bruce worked if and when she was available, with no set hours. Appellant did not supervise Ms. Bruce in performing the services; rather, the services were performed off-premises according to the ISP established through the State.

In *Evans v. Dir., Ohio Dep't of Job & Family Servs*, 10th Dist. No. 14AP-743, 2015-Ohio-3842, the trial court reversed the Commission's Decision after finding that the record established that the employer did not have the right to direct or control the workers. The Court of Appeals affirmed, stating:

Some, if not all, of this evidence militates in favor of an employer-employee relationship under the factors set forth in Ohio Adm.Code 4141-3-05(B). However, after considering the totality of those factors, we conclude that the trial court did not abuse its discretion in determining that Evans lacked the direction and control necessary for an employer-employee relationship to exist. Here, as is often true in these types of cases, both sides can point to evidence supporting their view. Employing the Ohio Adm.Code 4141-3-05(B) factors, the trial court examined all that evidence and determined that the reliable, probative, and substantial evidence did not support the UCRC's decision. *Id.*, ¶22.

Appellee relies upon *Miracle Home Health Care, supra*, 2012-Ohio-5669. However, the Court in that case focused upon the fact that the contract between the company and the home caregivers expressly provided the company with the right to direct and control the caregivers' work. *Id.*, ¶23. Here, by contrast, the contract, consistent with the rest of the evidence, shows that the direct care staff were independent contractors. (T. 22, Ex. E).

After reviewing the record, the Court finds that the Commission's Decision is not supported by reliable, probative, and substantial evidence or in accordance with law. The evidence in the record establishes that the workers at issue were independent contractors rather than covered employees. Accordingly, the Commission's Decision is hereby REVERSED. This is a final, appealable Order.

Franklin County Court of Common Pleas

Date: 03-07-2016
Case Title: FRIENDSHIP SUPPORTED LIVING INC -VS- OHIO STATE
DEPARTMENT JOB FAMILY SERVICE ET AL
Case Number: 15CV008721
Type: DECISION/ENTRY

It Is So Ordered.


The image shows a handwritten signature in black ink that reads "Laurel Beatty". The signature is written in a cursive style. To the right of the signature is a circular blue ink stamp. The stamp contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY, OHIO" in the middle, and "ALL THINGS ARE POSSIBLE" at the bottom.

/s/ Judge Laurel A. Beatty

Court Disposition

Case Number: 15CV008721

Case Style: FRIENDSHIP SUPPORTED LIVING INC -VS- OHIO
STATE DEPARTMENT JOB FAMILY SERVICE ET AL

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes